

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 9

Double Jeopardy in Controlled Substances Cases

9.5 A Controlled Substance Conviction or Acquittal in Another Jurisdiction Prevents Retrial for the Same Offense in Michigan

Add the following case summary as the second bulleted item on page 191:

In *People v Zubke*, ___ Mich ___, ___ (2003), the Michigan Supreme Court ruled that the state's possession with intent to deliver charge was not precluded under MCL 333.7409 by the defendant's federal drug-conspiracy conviction because the conduct on which the federal conviction was based was not the "same act" on which the state charge relied. Referring to the dictionary definition of "act," the Court reasoned that the state's prosecution would be barred if the "thing done" or "deed" giving rise to the federal conviction was the same "thing done" or "deed" on which the state charge was based. *Zubke, supra* at ___.

The Court concluded that the "thing done" for federal purposes was the conspiracy itself, the defendant's agreement with others to possess and distribute cocaine. *Zubke, supra* at ___. For state purposes, however, the "thing done" was the defendant's actual physical possession or control of cocaine. Ruling there was no double jeopardy violation, the Court stated simply:

"[T]he act of possessing is not subsumed within the act of conspiracy, nor is the act of conspiring subsumed within the act of possessing." *Zubke, supra* at ___ n 5.

The Michigan Supreme Court also overruled *People v Avila (On Remand)*, 229 Mich App 247 (1998), which held that MCL 333.7409 precluded successive prosecutions when the offenses "arose out of the same acts." *Zubke, supra* at ___, quoting *Avila, supra* at 251 (emphasis added).